(1) 95-1577

Supreme Court, U.S.
FILED
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CLERK

NO._____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1995

PAULA CONLEY and R. F. GRIFFIN, *Petitioners*

v.

BERYL EUGENE, *Respondent*

ON PETITION FOR A WRIT
OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Are the Petitioners entitled to a writ of certiorari based on an important question of federal law?

II. Did the Fifth Circuit Court of Appeals err in ruling that the Petitioners are not Entitled to Qualified Immunity?

LIST OF PARTIES

I. Ms. Beryl Eugene, Respondent.

II. Paula Conley and Officer R.F. Griffin, affiliated with Alief Independent School District, Petitioners.

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NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1995

PAULA CONLEY and R. F. GRIFFIN, Petitioners

v.

BERYL EUGENE, Respondent

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Paula Conley and R.F. Griffin respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, (Appendix C), is reported at 65 F.3d 1299 (5th Cir. 1995). The order on petition for rehearing of the court of appeals, the summary judgment order of the district court, and the final judgment of the district court (Appendices D, A, and B, respectively) are unreported.

STATEMENT OF JURISDICTION

On October 5, 1995, the Fifth Circuit Court of Appeals affirmed the district court's dismissal of all of the Respondent's claims against the Alief Independent School District ("District" or "AISD") and the dismissal of the Respondent's Texas Constitution claims against all parties, and reversed the district court's ruling that Petitioners Conley and Griffin were entitled to qualified immunity. On December 4, 1995, the court of appeals denied Petitioners' petition for rehearing. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Statement of Facts

This lawsuit arises out of a physical altercation between the Respondent and the Petitioner Griffin, a District security officer, on September 28, 1990. The Respondent's son attended Landis Elementary School (the "School") within the AISD during the 1990-91 school year. (R., p. 161). On September 28, 1990, the Respondent went to the School to attend a meeting concerning her son's educational program. (R., pp. 185, 186, 342, 343). During the meeting, the Respondent became angry. Respondent requested that someone get her son, and a school official was sent to retrieve her son. (R., p. 312).

At the direction of Petitioner Conley, the School's principal, Officer Griffin was summoned to restore order and provide security at the School. (R., pp. 184, 185, 179, 180). Officer Griffin was told that there was an upset parent who was getting out of control. (R., pp. 260, 241). The Respondent knew that Officer Griffin was a security officer. (R., p. 316). The Respondent angrily left the meeting and proceeded down a hallway where classes were in session to allegedly retrieve her son and to use the restroom. (R., pp. 311, 305, 240). Officer Griffin repeatedly asked the Respondent not to go toward the classroom area. (R., pp. 255, 305, 306, 303). Officer Griffin attempted to block the Respondent from going any further into the classroom area by stepping in front of her, face-to-face, thereby blocking the Respondent's way, and preventing her

from entering the area. (R., pp. 195, 194, 255, 304, 303). The Respondent then assertively told Officer Griffin to "get out of her face." (R., p. 302). Officer Griffin informed the Respondent that she would be arrested if she did not calm down. (R., p. 238). The Respondent did not calm down and refused to leave the area. A physical altercation ensued. (R., pp. 194, 237, 252, 231). The evidence is uncontroverted that during the altercation, the Respondent pushed Officer Griffin, bit him on the arm, and kicked him in the groin. (R., pp. 194, 299, 291, 254, 255, 187, 184, 185). Following this altercation, Officer Griffin hand-cuffed and subsequently arrested the Respondent. (R., pp. 290, 184). At all times during the altercation, the record is uncontroverted that Officer Griffin was acting pursuant to his duties as an AISD security officer. (R. pp. 190-195, 263, 260, 241).

The Respondent was criminally charged with aggravated assault on a police officer. After a jury trial, she was initially found guilty. (R., p. 152). However, the trial judge granted Respondent's motion for a new trial, and subsequently entered a verdict of not guilty. (R., p. 151).

B. Course of Proceedings and Disposition Below

The Respondent filed the instant lawsuit in the United States District Court for the Southern District of Texas, alleging violations of 42 U.S.C. § 1983 ("Section 1983"), the Texas Constitution, and state law tort claims for assault and battery, intentional and negligent infliction of emotional distress, negligence, false arrest, and defamation against the

Petitioners. (R., p. 11). After filing an answer, the Petitioners filed a motion for summary judgment on all claims asserted by the Respondent. (R., p. 210). The Respondent filed a response. (R., p. 343). By order dated April 5, 1994, the trial court granted the Petitioners' motion for summary judgment and dismissed the case in its entirety. (R., p. 364). Pursuant to the granting of summary judgment, the Court rendered a final judgment, ruling that the Respondent shall take nothing by her suit. (R., p. 365). The Respondent filed her notice of appeal on May 3, 1994. (R., p. 367).

In its opinion dated October 5, 1995, the Fifth Circuit Court of Appeals affirmed in part and reversed in part the decision by the district court. The dismissal of all claims against the AISD was affirmed, and the Fifth Circuit also affirmed the dismissal of the Petitioners' Texas Constitution claims.[1] However, the Fifth Circuit also held that Conley and Griffin were not entitled to qualified immunity, because material fact issues allegedly existed as to whether they had probable cause to arrest and prosecute the Respondent. On December 4, 1995, the Fifth Circuit denied Petitioners' petition for rehearing. Petitioners now file this Petition for Writ of Certiorari with this Court.

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[1] The Petitioners do not request review of the dismissal by the trial court of all claims against the District and the state constitutional claims against all parties, as the Fifth Circuit's affirmance of the dismissal of these claims was correct.

SUMMARY OF ARGUMENT

The issue of qualified immunity is a significant, unsettled question of federal law worthy of review by this Court. The application of this common law doctrine is particularly important with respect to school officials. School officials are responsible for the safety and welfare of hundreds of children on a daily basis, and therefore require broad discretion in exercising their functions. Qualified immunity is a necessary shield from liability for these officials, because it affords them protection while reasonably performing their duties.

The Petitioners argue that the Fifth Circuit Court of Appeals incorrectly ruled that Petitioners Conley and Griffin were not entitled to qualified immunity. The actions by Petitioners Conley and Griffin were discretionary and arose from the course and scope of their official duties. (R., p. 358). Moreover, no evidence has been adduced demonstrating that either Griffin or Conley did not utilize reasonable judgment and discretion in carrying out these duties. Id. Accordingly, the trial court correctly determined that Petitioners were entitled to qualified immunity from liability, and the Court of Appeals incorrectly ruled to the contrary.

REASONS FOR GRANTING THE PETITION

I. Petitioners are Entitled to a Writ of Certiorari in this Case Because an Important Question of Federal Law is Involved.

Pursuant to United States Supreme Court Rule 10, a petition for writ of certiorari is generally granted to resolve a split of authority among the circuit courts of appeal or to resolve significant, unsettled questions of federal law worthy of this Court's consideration. The applicability of qualified immunity in this context is an important, unsettled question of federal law. This issue is particularly significant in the school context, because school officials require broad discretion in performing their functions. Without the protection of qualified immunity while acting in the course and scope of their official duties, school officials will be less inclined to zealously perform their duties, thereby increasing violence and disorder in schools. In this case, the Fifth Circuit decided the qualified immunity issue in a way which conflicts with decisions of its own and this Court. This Court should accept review of this case to address this inequity.

II. The Fifth Circuit Court of Appeals Erred in Ruling that Petitioners are not Entitled to Qualified Immunity.

A. Objective Reasonableness

Qualified immunity protects public officials as long as their conduct does not violate clearly-established statutory or constitutional rights. See Nieto v. San Perlita ISD, 894 F.2d 174 (5th Cir. 1990). Qualified immunity shields government officials performing discretionary functions "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038 (1987). Whether a defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly-established law. Id., 483 U.S. at 639, 107 S.Ct. at 3038. If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity. Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986). Thus, even when a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity if the conduct was objectively reasonable. See Melear v. Spears, 862 F.2d 1177, 1188 (5th Cir. 1989).

Public officials acting within the scope of their official duties are shielded from civil liability by the doctrine of qualified immunity. See Harlow v. Fitzgerald, 457 U.S. 800,

102 S. Ct. 2727 (1982). In Harlow, this Court articulated the current standard for an official to be granted qualified immunity. The standard promulgated in Harlow states that "government officials will be protected while exercising discretionary powers, unless their conduct violates clearly-established statutory or constitutional rights of which a reasonable person would have known." Id. Like the court in Anderson, the Harlow court stated that "objective reasonableness of an official's conduct, as measured by reference to clearly-established law, would better balance the interests of aggrieved citizens against the interests of state officials and society." Id. Therefore, objective reasonableness is the appropriate standard for determining the application of qualified immunity.

Officer Griffin acted in an objectively reasonable manner in: (1) attempting to prevent the Respondent from entering an off-limits area (*i.e.*, the classroom area) and potentially disrupting the educational environment, and (2) arresting the Respondent when she refused to comply with his requests and physically accosted him. It is undisputed that Officer Griffin was called to the scene and informed that there was an upset parent who may be getting out of control. (R., pp. 260, 241). Upon attempting to prevent the Respondent from entering the classroom area by standing in front of her and after repeated requests to leave the area, the Respondent told Officer Griffin to "get out of her face." (R., pp. 195, 194, 255, 304, 303, 302). Officer Griffin then informed the Respondent that she would be arrested if she did not calm down. (R., p. 238). The Respondent failed to calm down and a physical altercation

ensued. The Respondent's disorderly conduct gave Officer Griffin probable cause to arrest her; thus, Griffin's actions were objectively reasonable. See Pfannstiel v. City of Marion, 918 F.2d 1178 (5th Cir. 1990) (the Fifth Circuit held that conduct which becomes disorderly is probable cause for an officer to arrest the actor.)

The Fifth Circuit's decision that the Petitioners' conduct was unreasonable is contrary to recent decisions by the same court. See Mangieri v. Clifton, 29 F.3d 1012 (5th Cir. 1994). In Mangieri, the court held that an officer acted reasonably when the officer arrested a protestor for turning up the volume on a bullhorn used by the protestor. Mangieri, 29 F.3d at 1017. Like Mangieri, in the instant case the officer made a decision to arrest and prosecute someone who potentially could incite a disturbance and harm innocent people, *i.e.*, children who were engaged in educational pursuits.

In Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir. 1992), cert. denied, 506 U.S. 973 (1992), the plaintiff contended that the defendant, a police officer, was not entitled to qualified immunity because the officer employed excessive force to effect an arrest of a drunk driving suspect who was shot and killed after a high-speed chase. Id. at 1274. Specifically, the officer had observed the suspect driving erratically and drinking alcoholic beverages. Id. at 1270. The officer maintained that he had no intention of shooting the suspect, but was forced to shoot him in self-defense because the suspect, while recklessly driving a pickup, attempted to run over the officer. Id. at 1274. The court found that due to the

suspect's conduct, the officer had a reasonable basis to act as he did, regardless of the eventual result of his actions; thus, the officer was entitled to qualified immunity. Id. at 1277.

Like the Respondent in the instant case, the Fraire plaintiff failed to offer any summary judgment evidence to show that the officer's use of force in defending himself was grossly disproportionate to the need. Id. at 1275. In light of Mangieri and Fraire, the Fifth Circuit improperly held in the instant case that Petitioners were not entitled to qualified immunity because their behavior was "objectively unreasonable." If a police officer who mortally wounds a drunk driving suspect is entitled to qualified immunity, then surely Ms. Conley and Officer Griffin are entitled to the same relief under the facts of this case.

Indeed, Ms. Conley's only action with respect to the altercation was calling Officer Griffin for help. (R., pp. 184, 185, 179, 180). However, the Fifth Circuit inexplicably determined that she was not entitled to qualified immunity. Ms. Conley, as a school principal, acted in an objectively reasonable manner in attempting to prevent the Respondent from causing disruption at the school. She, like Officer Griffin, had a duty to protect children while at school and limit interruptions of the educational process. By preventing the Respondent from proceeding into a restricted area of the school, the Petitioners acted both reasonably and professionally. Thus, Officer Griffin and Ms. Conley are entitled to the protections of qualified immunity. This Court

should grant a writ of certiorari to address the Fifth Circuit's erroneous decision.

B. Petitioners' Erroneous Belief is Irrelevant

In an attempt to clarify the meaning of "objective reasonableness", the court in Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092 (1986), and Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987) expanded the scope of immunity under Harlow by holding that officers may have immunity if they reasonably, though erroneously, believe that their actions under the specific circumstances do not violate clearly-established general principles of Fourth Amendment law.

The Petitioners believed that the Respondent was trying to enter the classroom area and retrieve her child. (R., pp. 311, 305, 240). This area was strictly prohibited to all non-employees of the school. (R., pp. 311, 305, 240). Officer Griffin reasonably believed that the safety of the children in the school was at risk because the Respondent was very upset and combative with him. (R., pp.194, 237, 252, 231). These facts, coupled with the Respondent's assault of Officer Griffin, led Griffin and Conley to believe that the Respondent was an imminent threat to the educational environment and potentially the safety of school children. Even if this belief were erroneous, it cannot subject them to liability. Officer Griffin reasonably concluded that he could lawfully arrest the Respondent, and no liability should attach. Therefore, a writ of certiorari should be granted to correct the erroneous decision by the Fifth Circuit.

C. No Clearly-Established Constitutional Violation

Qualified immunity is defeated where the defendant violates the clearly-established federal right on which the plaintiff's claim for relief is based. Davis v. Scherer, 468 U.S. 183, 193-196 and n.14, 104 S.Ct. 3012, 3018-20 and n.14 (1984). Whether an asserted federal right was clearly-established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts." See Mitchell v. Forsyth, 472 U.S. 511, 528, 105 S.Ct. 2806, 2816-17 (1985); Harlow v. Fitzgerald, 457 U.S. at 818, 102 S.Ct. at 2738; see generally Elder v. Holloway, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994).

Harlow recognized qualified immunity as being an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the legal question whether the conduct of which the plaintiff complains violated clearly-established law. See Mitchell v. Forsyth, 472 U.S. at 526, 105 S.Ct. at 2815. Where there is no violation of a clearly-established constitutional right, claims against individual public officials cannot succeed. See Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789 (1991) (emphasis added); Quives v. Campbell, 934 F.2d 668 (5th Cir. 1991).

In the instant case, the Respondent failed to demonstrate the violation of any clearly-established constitutional rights by the Petitioners. Siegert clarified the analytical structure under which a claim of qualified immunity should be addressed.

Siegert v. Gilley, 500 U.S. at 233, 111 S.Ct. at 1793; see also Quives, 934 F.2d at 670. The first inquiry in such a claim is whether the violation of a clearly-established constitutional right has been alleged. Id. (emphasis added). A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly-established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Id. In Siegert, the plaintiff failed not only to allege the violation of a constitutional right that was clearly-established at the time of the defendant's actions, but also to establish the violation of any constitutional right at all. Siegert, 500 U.S. at 233, 111 S.Ct. at 1794. As no constitutional violation was alleged or established, the court held that the defendant was entitled to qualified immunity. Id.

Like the Siegert plaintiff, the Respondent in the instant case has failed to demonstrate the violation of any constitutional right. Indeed, under Fraire, Pfannstiel and Mangieri, the law would appear to predominate in favor of the Petitioners. Furthermore, the Fifth Circuit failed to identify any authority demonstrating the violation of a clearly-established constitutional right. Yet, despite this, the Fifth Circuit ruled in favor of the Respondent. Accordingly, this Court should grant a writ of certiorari to address this issue, because the Petitioners are entitled to qualified immunity unless the Respondent can demonstrate the violation of a clearly-established constitutional right.

CONCLUSION

As the trial court stated, the evidence demonstrates that the actions by Ms. Conley and Officer Griffin were discretionary and arose from the course and scope of their official duties. (R., p. 358). With respect to Griffin, the trial court noted that there was no evidence that anything beyond the standard procedures used by police officers in restraining and arresting the Appellant were used by Griffin. (R., pp. 358, 190-194, 184, 185, 242, 243). Furthermore, the trial court indicated that no evidence was presented that either Griffin or Conley acted outside of the scope of their duties or did not utilize their judgment and discretion. Id.

School safety is of paramount importance in today's society. Likewise, school officials must be given broad discretion to maintain safety and preserve the integrity of the educational environment. This premise cuts to the core of the qualified immunity defense. Without this discretion, qualified immunity is rendered meaningless, and school officials are left defenseless to the ravages of unruly students and creative plaintiff's attorneys. The Fifth Circuit simply "missed the boat" on this important legal issue, and this Court should grant certiorari to correct this wrong. Thus, the Petitioners respectfully pray that their Petition for Writ of Certiorari be granted, and that this Honorable Court undertake the review of this case.

APPENDICES

(1) Lower Court Opinions

Appendix A	April 8, 1994, order of United States District Judge Kenneth M. Hoyt granting Defendants' Motion for Summary Judgment
Appendix B	April 8, 1994, final judgment of the district court, adjudging that the Plaintiff take-nothing by her suit
Appendix C	October 5, 1995, court of appeals opinion, affirming the district court's dismissal of all claims against the AISD and the dismissal of the Respondent's Texas Constitution claims, and reversing the district court's holding that Conley and Griffin were entitled to qualified immunity.
Appendix D	December 4, 1995, court of appeals order denying petition for rehearing

(2) Judgment to be Reviewed

See Appendix C, supra.

(3) Order on Rehearing

See Appendix D, supra.

Respectfully submitted,

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APPENDIX A

SUMMARY JUDGMENT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

APRIL 08, 1994

Michael N. Milby, Clerk

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BERYL EUGENE,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-93-0493
	§	
ALIEF INDEPENDENT	§	
SCHOOL DISTRICT,	§	
PAULA CONLEY AND	§	
R. F. GRIFFIN,	§	
INDIVIDUALLY,	§	
AND IN THEIR	§	
RESPECTIVE	§	
OFFICIAL CAPACITIES,	§	
	§	
Defendants.	§	

SUMMARY JUDGMENT ORDER

The current action arises out of a dispute between the plaintiff, Beryl Eugene, and the defendants, Alief Independent School District, Paula Conley and R. F. Griffin, individually, and in their official capacities. Pending before the Court is the defendants' motion for summary judgment. The Court, having

reviewed the motion, the response thereto, the record on file, and the applicable law, is of the opinion that the defendants' motion shall be granted.

FACTS & PROCEDURAL HISTORY

The plaintiff's son attended Landis Elementary School in the Alief Independent School District during the 1990-91 school year. On September 28, 1990, the plaintiff attended a meeting at the school concerning her son. During the meeting, she became angry and Griffin, a School District police officer, was summoned to restore order and provide security. The plaintiff left the meeting and proceeded down a hallway where classes were in session. When Griffin blocked the plaintiff's way, preventing her from disrupting the classes, a physical altercation ensued and the plaintiff bit Griffin in the process. Griffin arrested and handcuffed the plaintiff.

The plaintiff was charged with aggravated assault on a peace officer and, after a jury trial, was found guilty. However, the trial judge granted the plaintiff's motion for new trial and entered a verdict of not guilty.

The plaintiff alleges violations under Title 42 U.S.C. § 1983, the Texas Constitution, and state law claims for assault and battery, intentional and negligent infliction of emotional distress, and defamation against the defendants. Against these claims, the defendants have filed a motion for summary judgment.

The defendants' motion for summary judgment asserts that the plaintiff's claims fail because they do not allege viable constitutional claims and even if they do, no custom or policy can be established for which a § 1983 action may be

maintained and proved. In addition, the individual defendants argue that they are entitled to qualified immunity. To this defense, the plaintiff argues that this case is not based on an isolated incident, but incorporates the policies and practices of the School District. Moreover, the individual defendants are not covered under qualified immunity.

AUTHORITIES & DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of informing the Court of the basis of its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc., 669 F.2d 1026, 1030-31 (5th Cir. 1982). The defendant is entitled to summary judgment if no reasonable jury could find by a preponderance of the evidence that the plaintiff could prevail on his case based on the record evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986).

The plaintiff complains that the defendants have violated her constitutionally-protected rights under Title 42 U.S.C. § 1983. Specifically, she alleges that her Fourteenth Amendment rights to be free from malicious prosecution, retaliation, false arrest and bodily harm were violated. These claims are not truly constitutional claims but rather are analogous to state law tort claims and do not rise to the level of constitutional violations. Collins v. City of Harker Heights, 112

S.Ct. 1061, 1070 (1992). Unless the harm done by a state official was done pursuant to a custom or policy adopted by the school district, no liability arises.

Section 1983 is implicated only if a plaintiff, through the execution of a policy or toleration of a custom by a governmental unit, is deprived of his or her constitutional rights. Monell v. New York Dept. of Social Services, 436 U.S. 658, 690-91 (1978). School districts like municipalities are liable under § 1983 when a plaintiff is deprived of constitutional rights through the action of a school official taken pursuant to a formal policy or well-established custom. Id.

The evidence in this case demonstrates a single, isolated incident. The United States Supreme Court and the Fifth Circuit have consistently declined to impose liability under § 1983 when the alleged violation relates to a single incident rather than an ongoing policy or custom. City. of St. Louis v. Praprotnik, 485 U.S. 112 (1988); Berry v. McLemore, 670 F.2d 30, 32 (5th Cir. 1982). Absent a consistent policy or custom which violated the plaintiff's constitutional rights, the School District cannot be held liable under § 1983.

Likewise, the plaintiff's constitutional tort claims cannot succeed against Griffin and Conley, the individual defendants. As a matter of law, these individuals are entitled to qualified immunity from liability where they acted within the course and scope of their official duties. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). Qualified immunity protects public officials so long as their conduct does not violate clearly-established statutory or constitutional rights of which a reasonable person would have known. Nieto v. San Perlita I.S.D., 894 F.2d 174 (5th Cir. 1990).

The plaintiff has failed to demonstrate an actionable violation of her constitutional right by the defendants. "Even when a defendant's conduct actually violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity if the conduct was objectively reasonable. "Fraire v. City of Arlington, 957 F.2d 1268 (5th Cir.) cert. denied, 113 S.Ct. 462 (1992). Here, the individual's conduct was reasonable and confined to their duties and responsibilities.

The plaintiff's resort to constitutional tort claims under Article 1, § 19 of the Texas Constitution, are also unmeritorious. Bagg v. University of Texas Medical Branch, 726 S.W.2d 582, 584 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). In Gillum v. City of Kerrville, 3 F.3d 117 (5th Cir. 1993), the Fifth Circuit opined that no state constitutional tort claim exists, either against a governmental entity or against individual government employees, where the individuals exercised their discretionary authority pursuant to state law. Id.

The individual defendants are professional employees of the School District and are, therefore, entitled to statutory immunity from liability for their discretionary action. See Tex. Educ. Code Ann. § 21.912 (Vernon 1987); see also Jones v. Houston I.S.D., 979 F.2d 1004, 1007. Discretionary acts are those in which the official gathers facts and then acts or exercises personal judgment. See Augustine v. Nusom, 671 S.W.2d 112, 115 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e).

Texas common law, likewise, shields public employees from liability for discretionary actions when they act within the course and scope of their authority. See Russell v. Texas Dept. of Human Resources, 746 S.W.2d 510, 514 (Tex. App.--Texarkana 1988, writ denied). An official can only lose

immunity by abandoning official duties or acting outside the scope of official duty. Russell v. Edgewood I.S.D., 406 S.W.2d 249, 252 (Tex. Civ. App.--San Antonio 1966, writ ref'd n.r.e.).

The evidence indicates that the individual defendant's action, regarding the plaintiff, was discretionary action arising within the course and scope of their official duties. There is no evidence that anything beyond the standard procedures to be used by a peace officer was used in restraining and arresting the plaintiff. Likewise, there is no evidence that the individuals were acting outside the scope of their duties, or not using their best judgment and discretion.

The plaintiff concedes that all common law tort actions as to the School District and to Griffin and Conley, in their official capacities, are meritless due to immunity granted by the Texas Education Code and the Texas Tort Claims Act. This concession leaves little for discussion.

For the foregoing reasons the defendants' motion for summary judgment is Granted.

It is so ORDERED.

Signed this 5th day of April, 1994.

s/Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX B

FINAL JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

APRIL 08, 1994

Michael N. Milby, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BERYL EUGENE, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-93-0493
ALIEF INDEPENDENT SCHOOL DISTRICT, PAULA CONLEY AND R. F. GRIFFIN, INDIVIDUALLY, AND IN THEIR RESPECTIVE OFFICIAL CAPACITIES, Defendants.	§	

FINAL JUDGMENT

Based on the findings and conclusions reached in the summary judgment order filed in this case, the plaintiff shall take-nothing by their suit.

This is a FINAL JUDGMENT.

Signed this 5th day of April, 1994.

s/Kenneth M. Hoyt

APPENDIX C

APPENDIX C

Beryl EUGENE, Plaintiff-Appellant,

v.

ALIEF INDEPENDENT SCHOOL DISTRICT, Paula Conley and R.F. Griffin, Individually and in their Official Capacities, Defendants-Appellees.

No. 94-20352

United States Court of Appeals,
Fifth Circuit.

Oct. 5, 1995.

Before REYNALDO G. GARZA, HIGGINBOTHAM and PARKER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Beryl Eugene filed this 42 U.S.C. § 1983 suit against Alief Independent School District, Paula Conley and R.F. Griffin, claiming that she was wrongly arrested and prosecuted in violation of her state and federal constitutional rights. Holding that summary judgment in favor of Alief Independent School District was proper and that summary judgment in favor of Paula Conley and R.F. Griffin was improper, we affirm in part and reverse in part.

I.

FACTS

Beryl Eugene's (Eugene) son attended Landis Elementary School in Alief Independent School District (A.I.S.D.) during the 1990-1991 school year. On September 28, 1990, Eugene attended a meeting at the school concerning her son. She voiced complaints because she believed that her son's placement in a special education program was racially motivated--he is black, and Alief is predominantly white. She also complained that her son's medication had been mishandled by school personnel. Her son's teacher, a special education counselor, the assistant principal, and the school nurse initially came to the meeting. The nurse left after a short time and the assistant principal, concerned that Eugene was angry, summoned the principal, Paula Conley (Conley), and a school security officer, R.F. Griffin (Griffin).

Eugene decided to withdraw her son from school and asked that someone go get her son. The counselor left the conference room to get her son from his class. Eugene stated that she needed to use the restroom, left the conference room and started down the hall toward the classrooms. Eugene claims that she did not know that the hall led to the classrooms, and that she was simply looking for a restroom. Conley told Griffith to stop Eugene. Conley then pushed Eugene, and again told Griffin to stop her. Eugene claims that, when pushed by Conley, she attempted to explain that she simply needed to go to the bathroom. Griffin then pushed Eugene, and Eugene pushed back. Griffin then tripped Eugene, pushed her to the ground, and tried to handcuff her. When she resisted, Griffin began to choke her. She then bit his hand to make him let go of her neck. Griffin then told Eugene that she was under arrest,

and she allowed him to handcuff her. Eugene was not aware that Griffin was a police officer during the confrontation.

Eugene was charged with assault on a police officer and found guilty by a jury. The state district judge, however, entered a verdict of not guilty as a matter of law.

Less than one year after her acquittal, Eugene filed suit against A.I.S.D., Conley and Griffin in state district court, alleging violations of her constitutional rights under the Texas and federal constitutions, as well as state common law causes of action.[1] The defendants removed the case to federal district court. A.I.S.D., Conley and Griffin then moved for summary judgment on five grounds: (1) Eugene did not assert any constitutional violations actionable under 42 U.S.C. § 1983; (2) Eugene could not recover against A.I.S.D. because she did not show that an official policy or custom of A.I.S.D. caused her rights to be violated; (3) Conley and Griffin were entitled to qualified immunity; (4) no cause of action existed for violations of the Texas state constitution; and (5) Eugene's claims were barred by limitations. The district court granted Appellees' motion for summary judgment on the first four grounds, and entered judgment in favor of Appellees. Eugene appeals from that judgment.

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[1] Eugene did not appeal the district court's granting of summary judgment dismissing her state common law causes of action. Thus, the propriety of that dismissal is not before this Court.

II.

STANDARD OF REVIEW

[1] This is an appeal from a summary judgment. Our review of the record is plenary, *International Shortstop, Inc. v. Rally's,* 939 F.2d 1257, 1263 (5th Cir. 1991), *cert denied* 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992), and "in reviewing a grant of summary judgment we use the same standard used by the district court." *Dorsett v. Board of Trustees of State Colleges & Universities,* 940 F.2d 121,123 (5th Cir. 1991). "Having delved through the record to set forth all of the facts in a light most favorable to Sanders, we must now consider whether an application of the relevant law to those facts will lead us to the inescapable conclusion that Appellees are entitled to judgment in their favor as a matter of law." *Sanders v. English,* 950 F.2d 1152, 1159 (5th Cir. 1992).

III.

VALIDITY OF EUGENE'S SECTION 1983 CAUSE OF ACTION

[2] We first address whether the district court erred in holding the Eugene's allegations of malicious prosecution, retaliation, false arrest and bodily harm were not actionable under 42 U.S.C. § 1983 (Section 1983). Whether such acts are actionable is a question of law; consequently, we apply a *de novo* standard of review.

[3] This circuit has explicitly held that malicious prosecution, false arrest and bodily harm are actionable under Section 1983 because they violate the Fourth and Fourteenth Amendments. *Sanders v. English* 950 F.2d 1152, 1159 (5th Cir.

1992). *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450-51 (5th Cir. 1994), *cert. denied* — U.S. —, 115 S.Ct. 70, 130 L.Ed.2d 25. Thus, the district court erred when it held that such claims were not actionable. This case is complicated, however, by the Supreme Court's decision in *Albright v. Oliver*, — U.S. —, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), which was decided while the instant case was on appeal. *Albright* held that pretrial deprivations of liberty, such as malicious prosecution, are not actionable under the Fourteenth Amendment, but left open the possibility that such claims would be actionable under the Fourth Amendment. *Id.* at —, 114 S.Ct. at 813. Because Eugene's Section 1983 claims were based on violations of her Fourteenth Amendment rights, her petition no longer states a claim after *Albright*.

[4] While we do not question *Albright*, we will not affirm the summary judgment based on that case. Had the district court followed this circuit's case law when it decided the motion for summary judgment, it would have found that Eugene had a cause of action. When *Albright* was decided, Eugene would then have been able to amend her complaint to base her Section 1983 action on violations of the Fourth, rather than the Fourteenth, Amendment. Thus, to the extent that Eugene's summary judgment evidence establishes a fact issue as to whether she can maintain suit against Appellees,[2] she should be able to amend her complaint to base her claims on the Fourth Amendment.

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[2] Based on our holding in Section IV, *infra*, Eugene failed to create a fact issue as to whether A.I.S.D. can be held liable under Section 1983, and therefore cannot amend her complaint as to A.I.S.D. on remand.

IV.

EUGENE'S CLAIMS AGAINST A.I.S.D.

[5] Eugene's summary judgment evidence failed to create a fact issue as to whether A.I.S.D. can be held liable under Section 1983. A.I.S.D. cannot be held liable trader Section 1983 on a theory of respondeat superior for the actions of its employees. *See Monell v. Department of Social Services,* 436 U.S. 658, 690-94, 98 S.Ct. 2018, 2035-37, 56 L.Ed.2d 611 (1978); *Johnson v. Moore,* 958 F.2d 92, 93 (5th Cir. 1992). Eugene must show that her Constitutional rights were violated through the execution of an official policy by A.I.S.D./d. This circuit has defined official policy as:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [district]... or by an official to whom the [district] ha[s] delegated policy-making authority; or
>
> 2. A persistent, widespread practice of [district] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents [district] policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the district or to an official to whom that body had delegated policy-making authority.

Johnson, 958 F.2d at 941. Eugene advances two arguments to support her claim that her rights were violated by the execution of an official A.I.S.D. policy. First, she argues that force is a policy of A.I.S.D., and that excessive force is an accepted practice. Second, she argues that, under the site-based management philosophy adopted by the Texas Education Agency, A.I.S.D. delegated final decision-making authority on the Landis school campus to Conley. Because Conley ordered

Griffin to arrest her, she argues, the arrest and subsequent prosecution were official policies of the school district.

[6] Eugene's summary judgment evidence failed to create a fact issue as to whether the use of excessive force against parents was an official policy of A.I.S.D. In support of her argument, Eugene presented evidence of a school manual allowing teachers to use physical force against children that were out of control, and of evidence of two alleged incidents of A.I.S.D. officials using excessive force against students. This evidence, however, is only indicative of A.I.S.D.'s policy of using force against unruly students; it does not show that A.I.S.D. had a policy to use excessive force against parents.

[7] Eugene also failed to raise a fact issue as to whether Conley had the type of final policy-making authority that would subject A.I.S.D. to liability under Section 1983. Only the actions of district officials with final policy-making authority subject the district to such liability. *St. Louis v. Praprotnik*, 485 U.S. 112, 128, 108 S.Ct. 915, 926-27, 99 L.E.2d 107 (1988). Whether Conley had final policy-making authority is a question of state law./d. If she can show that Conley had such authority, she would also have to show that Conley was responsible under state law for making policy relating to security decisions. Eugene failed to make such a showing.

[8-10] Under Texas law, the final policy-making authority in an independent school district rests with the district's board of trustees. *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1245 (5th Cir. 1993) (citing Tex. Educ. Code Ann. §§ 23.01 & 23.26(b) & (d) (Vernon 1987)). Eugene failed to create a fact issue as to whether A.I.S.D.'s trustees delegated final policy-making authority in the area of security to Conley. Texas law enumerates the duties of a principal, and security is

not one of them. *See* Tex. Educ. Code Ann.§ 13.352 (Vernon 1991). Moreover, although Texas law provides that the principal is to exercise decision-making authority in certain areas, even in those areas the principal must follow the guidelines and policies established by the school district. *Id.* Thus, under Texas law Conley did not have final policy-making authority for security.

[11] Eugene also failed to create a fact issue as to whether A.I.S.D.'s trustees delegated policy-making authority for security to Conley. Eugene's sole support for her delegation theory was a bare assertion that, under the Texas Education Agency's site-based management philosophy, A.I.S.D. delegated final decision-making authority on the Landis campus to Conley. This bare allegation, unsupported by any evidence, is not sufficient to defeat summary judgment. In any event, assuming *arguendo* that Conley had decision-making authority for security, Eugene does not even argue that she had policy-making authority. When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the decision-maker's departure from them, are the act of the municipality. *Jett*, 7 F.3d at 1246-51. Thus, Eugene failed to create a fact issue as to whether policy-making authority for security was delegated to Conley.

Because Eugene failed to create a fact issue as to whether her rights were violated through the execution of an official A.I.S.D. policy, summary judgment in favor of A.I.S.D. was proper. Thus, the district court's decision to grant summary judgment in favor or A.I.S.D. is affirmed.

V.

QUALIFIED IMMUNITY

[12-14] The district court erred in holding that Conley and Griffin were entitled to qualified immunity. Public officials acting within the scope of their official duties are shielded from civil liability by the doctrine of qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. 800, 815-19, 102 S.Ct. 2727, 2736-38, 73 L.Ed.2d 396 (1982). However, qualified immunity does not shield a public official whose conduct violates clearly-established constitutional rights, if a reasonable person would have known that such conduct was unconstitutional. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396. To establish that Conley and Griffin are not entitled to qualified immunity, Eugene must satisfy a three-pronged test. First, she must show that she has asserted a violation of a constitutional right. *Siegert v. Gilley,* 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1992). Second, she must show that this right was clearly established at the time of Conley and Griffin's actions. Id. at 233-34, 111 S.Ct. at 1794. Third, she must show that Conley and Griffin' s actions were objectively unreasonable. *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738.

[15-16] Eugene satisfied this three-pronged test. First, she asserted a violation of a constitutional right, her right under the Fourth and Fourteenth Amendments to be flee from malicious prosecution, false arrest and bodily harm. *See Sanders,* 950 F.2d at 1159; *Doe,* 15 F.3d at 450-51. Second, this right was clearly established. This circuit held that she had such a right long before the incident in question. *See, e.g., Shaw v. Garrison,* 467 F.2d 113, 120 (5th Cir. 1972), *cert. denied* 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317. Finally,

the summary judgment evidence created a fact issue as to whether Conley and Griffin's actions were objectively unreasonable. Arresting and prosecuting Eugene would be objectively unreasonable if Conley and Griffin did not have probable cause for the arrest and prosecution. To have probable cause, Conley and Griffin would have to possess knowledge that would warrant a prudent person's belief that Eugene had already committed or was committing a crime. *See Duckett v. Cedar Park*, 950 F.2d 272, 278 (5th Cir. 1992). Griffin's deposition testimony, excerpts of which were properly before the district court as summary judgment evidence, supports a finding that she was committing no crime. The directed verdict of acquittal likewise militates against summary judgment. A reasonable fact finder could have concluded, based on this evidence, that she was simply looking for a bathroom when Griffin, whom she did not know to be a police officer, assaulted her. Thus, the evidence created a fact issue as to whether Conley and Griffin had probable cause to arrest and prosecute her.

Because the summary judgment evidence created a fact issue as to whether Conley and Griffin were entitled to qualified immunity, the court erred in granting summary judgment on that ground. Thus, the district court's decision is reversed as to the granting of summary judgment against Eugene on her Section 1983 claims against Conley and Griffin.

VI.

CONSTITUTIONAL TORTS UNDER THE TEXAS CONSTITUTION

[17, 18] The district court correctly decided that Eugene's constitutional tort claims under Article I, Section 19

of the Texas Constitution were unmeritorious. Whether Eugene made out such a cause of action is a question of law, which we will review *de novo*. Texas does not appear to recognize violations of its constitution as an independent tort. One Texas Court of Appeals has stated that "Texas has a strong bill of rights, but... no Texas statute or case... provides a citizen the kind of redress afforded by 42 U.S.C. § 1983 or by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*. There is no state constitutional tort." *Bagg v. University of Texas Medical Branch*, 726 S.W.2d 582, 584 n.1 (Tex.App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (citations omitted). *See also City of Houston v. Leach*, 819 S.W.2d 185 (Tex. App.—Houston [14th Dist.] 1991, no writ). *But see Jones v. Memorial Hosp. Sys.*, 746 S.W.2d 891 (Tex.App.—Houston [lst Dist.] 1988, no writ). This circuit has not passed on the question of whether an actionable "state constitutional tort" exists under Texas law, and we need not pass on the issue in this case. In *Gillum v. City of Kerrville*, 3 F.3d 117, 122 (5th Cir. 1993), *cert. denied* — U.S. —, 114 S.Ct. 881,127 L.Ed.2d 76, we held that, even if such a "tort" exists, Texas law would not allow government employees to be sued for exercising their discretionary authority. Because the evidence is uncontroverted that Conley and Griffin were acting within their discretionary authority—that is, as a principal and as a security guard—the district court properly held that they were immune to any suit under state law, including one based on the Texas Constitution. *Id. See* Tex. Educ. Code Ann. § 21.912 (Vernon 1987).

VII.

LIMITATIONS

[19, 20] As an additional grouped for affirming the summary judgment, Appellees argue that the statute of limitations had run before Eugene filed suit. Her Section 1983 claims are subject to a two-year statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261,279, 105 S.Ct. 1938, 1948-49, 85 L.Ed.2d 254 (1985); Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986). Those claims arise from events that occurred on September 28, 1990, and she did not file her original suit in state court until December 9, 1992. However, because she could not file suit based on malicious prosecution until December 10, 1991, when she was acquitted from the criminal charges against her, Eugene' s cause of action did not accrue until she was acquired. *See Johnson v. Louisiana Dept. of Agriculture,* 18 F.3d 318, 320-21 (5th Cir. 1994). Because less than two years elapsed between the accrual of her claim and the date she filed her original petition in state court, her Section 1983 claims are not barred by limitations.

VIII.

CONCLUSION

We affirm the district court's summary judgment in favor of Alief I.S.D. and dismissing Eugene's state constitutional tort claims against Conley and Griffin, reverse and remand the district court' s summary judgment in favor of Conley and Griffin insofar as it dismissed Eugene's 42 U.S.C. § 1983 claims against them, and order the trial court to allow Eugene to amend her complaint to bring her 42 U.S.C. § 1983 claims under the Fourth Amendment.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX D

ORDER ON PETITION FOR REHEARING

U.S. COURT OF APPEALS
FILED

December 04, 1995

Charles R. Fulbruge, III, Clerk

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 AND STAY OF THE
MANDATE.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-20352

BERYL EUGENE,

Plaintiff-Appellant,

v.

ALIEF INDEPENDENT SCHOOL DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ORDER ON PETITION FOR REHEARING

(December 4, 1995)

Before REYNALDO G. GARZA, HIGGINBOTHAM and PARKER, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

We wish to point out, however, that our opinion in no way decides the issue of whether Ms. Eugene had a Fourth Amendment right to be free from malicious prosecution.

ENTERED FOR THE COURT:

s/Reynaldo G. Garza

REYNALDO G. GARZA
United States Circuit Judge